

Complaint

60 F.T.C.

IN THE MATTER OF

CHARLES M. LEVINSON ET AL. TRADING AS
SURE-FIT SEAT COVER CENTERORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 8202.—Complaint, Dec. 6, 1960—Decision, Apr. 28, 1962*

Order dismissing, for failure of proof, complaint charging Washington, D.C., retailers with misrepresentations in a so-called Washington's Birthday seat cover sale, consisting of use of the word "Reg." in advertising prices, and words "customized", "plastic fiber", and "vinyl plastic" in describing their seat covers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Charles M. Levinson and Maurice Bernstein, individually and as copartners trading as Sure-Fit Seat Cover Center, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Charles M. Levinson and Maurice Bernstein are individuals and copartners trading as Sure-Fit Seat Cover Center, with their office and principal place of business located at 1601 14th Street, N.W., Washington, D.C.

PAR. 2. Respondents are now, and for some time last past have been, engaged in advertising, offering for sale, sale and distribution, among other things, of automobile seat covers, floor mats and convertible tops to the public through retail stores operated by respondents in the District of Columbia and in the States of Maryland and Virginia and maintain and at all times mentioned herein have maintained a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, and for the purpose of inducing the sale of their merchandise, respondents have made certain statements concerning such merchandise in advertisements in newspapers of general circulation. Among and typical but not all inclusive of the statements so made are the following:

930

Complaint

WASHINGTON'S BIRTHDAY SEAT COVER SALE MONDAY, FEB. 22 ONLY

TREMENDOUS DISCOUNTS—SEAT COVERS & FLOOR MATS CLOSEOUT

REG. 14.95—FIBRE & PLASTIC SEAT COVERS

REG. 5.95 UP—FRONT OR REAR RUBBER FLOOR MATS

SALE PRICE ONLY 2.95—FULL SETS OR FULL MATS

TREMENDOUS SELECTIONS—MANY NEW PATTERNS—CLEAR PLASTIC,
PLASTIC FIBRE, WOVEN PLASTIC, JETSPUN GARDLON

REG. 14.95 TO 24.95

YOUR CHOICE—ONLY 9.80—FULL SETS

VINYL FIBRE ALL VINYL TRIM

CUSTOMIZED CLEAR PLASTIC—FULL SETS

REG. 29.95 ONLY 22.55

CLEAR PLASTIC—FULL SETS

REG. 9.95 ONLY 6.86

PAR. 4. By means of the aforesaid statements respondents have represented, directly or by implication:

1. That the higher prices listed under the designation "Reg." were the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business and that savings amounting to the differences between these prices and the lower sales prices would result to purchasers.

2. Through the use of the word "customized" that their seat covers are made to order for the automobile of each purchaser.

3. Through the use of the terms "plastic fibre" and "vinyl fibre" that certain of their seat covers are made of such fibers.

PAR. 5. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact:

1. The higher prices listed under the designation "Reg." were not the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business but were in excess of such prices, and the savings amounting to the differences between such higher prices and the lower sales prices would not result to purchasers.

2. Respondents' said seat covers are not made to order for the automobile of each purchaser but are ready-made.

3. Respondents' seat covers which they designate as "plastic fibre" and "vinyl fibre" are not made of plastic and vinyl fibers but are made of plastic and vinyl coated fibers.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of automobile seat covers, floor mats and convertible tops of the same general kind and nature as those sold by respondents.

PAR. 7. Respondents fail to adequately disclose in their advertisements that the installation charge is included in the stated regular price of the merchandise but is not included in the stated reduced price of the merchandise thus representing that the reduction in price and the consequent savings resulting to purchasers is greater than is the fact.

PAR. 8. The use by the respondents of the aforesaid false, deceptive and misleading statements and representations and their failure to make disclosure as aforesaid has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and to induce the purchase of substantial quantities of respondents' seat covers, floor mats and convertible tops because of such erroneous and mistaken belief. As a result thereof trade in commerce has been unfairly diverted to respondents from their competitors and injury has been done thereby to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Charles W. O'Connell supporting the complaint.

Mr. Nathan L. Silberberg, of Washington, D.C., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

Charles M. Levinson and Maurice Bernstein, individually and as copartners trading as Sure-Fit Seat Cover Center, are charged with false advertising in violation of the Federal Trade Commission Act. The alleged false advertising was one identical advertisement which appeared in *The Sunday Star* on February 21, 1960, and *Washington Post* on Monday, February 22, 1960, advertising a so-called Washing-

ton's Birthday seat cover sale to be held at individual respondents' stores on February 22, 1960. The advertisement listed merchandise in addition to seat covers, but the complaint is directed toward alleged misrepresentations in the advertisement relating to seat covers and rubber floor mats.

At the time the advertisement was published, the individual respondents above named were partners doing business as Sure-Fit Seat Cover Center, as alleged in the complaint. On July 1, 1960, the partnership ceased doing business and was incorporated under the name Seat Cover, Inc., a District of Columbia corporation. Five months later, on December 6, 1960, the complaint herein was issued against Charles M. Levinson and Maurice Bernstein, individually and as co-partners trading as Sure-Fit Seat Cover Center. The complaint has not been amended to include the corporation as a respondent. The individual respondents answered and denied the material allegations of the complaint; they contended that: (1) they had previously entered into a stipulation with the Commission and agreed to cease and desist from the very practices which form the basis of the complaint herein, (2) the violations charged in the complaint are *de minimis*, (3) have been abandoned, and (4) the Federal Trade Commission is not concerned with advertising of Washington's Birthday sales in the Washington Metropolitan area as indicated by the remarks of the Hon. Earl W. Kintner, then Chairman of the Commission, in an address before the Rotary Club of Washington, D.C., on February 21, 1961.

Hearings have been completed and respective counsel have filed proposed findings of fact, conclusions of law and order. Counsel for the individual respondents has also filed a reply to the findings proposed by counsel supporting the complaint. All findings of fact and conclusions of law not specifically found or concluded herein are denied. Upon the basis of the entire record, the undersigned hearing examiner makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. On February 21, 1960, the individual respondents Charles M. Levinson and Maurice Bernstein were partners doing business as Sure-Fit Seat Cover Center, with an office and principal place of business located at 1601 14th Street, N.W., Washington, D.C., and stores also located at 1634 New Hampshire Avenue, Takoma Park, Md., and 3300 North Fairfax Drive, Arlington, Va. On July 1, 1960, the partnership ceased doing business and was incorporated under the laws of the District of Columbia with the name Seat Covers, Inc. The individual respondents were the incorporators.

2. Pursuant to Sections 1.54 and 1.55 of the Rules of Practice of the Federal Trade Commission then in effect, the individual respondents, on December 20, 1957, entered into and executed a "Stipulation As To The Facts And Agreement To Cease and Desist," which was approved by the Commission on January 23, 1958, with respect to certain practices, including representations as to "usual and regular prices of certain seat covers."

3. On and prior to February 21, 1960, the individual respondents were engaged in advertising, offering for sale, sale and distribution, among other things, of automobile seat covers, floor mats and convertible tops to the public through retail stores operated by respondents in the District of Columbia and in the States of Maryland and Virginia, and maintained a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act. Since July 1, 1960, the successor corporation, Seat Covers, Inc., has continued to maintain a substantial course of trade in said merchandise.

4. On February 21, 1960, at the instance of the individual respondents, then doing business as Sure-Fit Seat Cover Center, and for the purpose of inducing the sale of some of their merchandise, the complained of advertisement (CX-1) appeared in *The Sunday Star*.

The same advertisement (CX-1) also appeared in the *Washington Post* on February 22, 1960.

5. The complaint alleges that, in said advertisement (CX-1), respondents have represented:

1. The higher prices listed in said advertisement under the designation "Reg." were the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business, whereas, such higher prices were not the prices at which the advertised merchandise had been usually and customarily sold by respondents at retail in the recent regular course of business, but were excess of such prices.

2. Through use of the word "customized" respondents represented that their seat covers were made to order for the automobile of each purchaser, whereas, said seat covers were not made to order for the automobile of each purchaser but were ready-made.

3. Through use of the terms "plastic fibre" and "vinyl fibre" individual respondents represented that certain of their seat covers were made of such fibers, whereas, such designated seat covers were not made of plastic and vinyl fibre but were made of plastic and vinyl coated fibres.

6. The complaint also alleged that the advertisement (CX-1) did not adequately disclose that the installation charge was included in the stated regular price of the merchandise but was not included in the reduced sale price, thus representing that the reduction in price was greater than was actually the fact.

7. Prior to the hearings herein, counsel supporting the complaint requested and there was issued and served on the individual respondent Charles M. Levinson, a subpoena duces tecum, directing Mr. Levinson to appear at a hearing and produce all invoices or sale slips showing previous retail sales by individual respondents of specified merchandise sold during the period from February 23, 1958 to February 22, 1960, which had been advertised in CX-1 for sale on Washington's Birthday, February 22, 1960. Thus, at the instance of counsel supporting the complaint, Mr. Levinson was required to produce at the hearing invoices showing previous retail sales of specified merchandise for the two years immediately preceding the advertised (CX-1) Washington's Birthday Seat Cover Sale on February 22, 1960.¹ In obedience to the subpoena duces tecum, Mr. Levinson produced more than 2,200 invoices or sale slips showing previous retail sales during the period February 23, 1958 to February 22, 1960 of the seat covers and rubber floor mats called for in the subpoena duces tecum.

8. Mr. Levinson was the principal witness offered by counsel supporting the complaint to establish the allegations.² Counsel sought to establish the allegations of the complaint through his direct examination of Mr. Levinson concerning the Washington's Birthday sale advertisement (CX-1) and the invoices called for in the subpoena duces tecum. The principal allegations of the complaint and the largest part of the evidence received at the hearing have to do with the use of the abbreviation "Reg." in the advertisement (CX-1). Counsel supporting the complaint contends that, by use of the term "Reg." with a stated price figure, individual respondents thereby represented that the advertised merchandise had been usually and customarily sold at the stated price by individual respondents at retail in the recent regular course of business, and that said representation was false because said stated price was in excess of the price at which individual respond-

¹ Mr. Thomas J. Kerwan, then attorney-investigator for the Federal Trade Commission, made the investigation of individual respondent's Washington's Birthday Sale advertisement (CX-1) prior to issuance of the complaint herein and, presumably, examined all of these invoices and sales slips during the course of three days spent at the principal place of business of the individual respondents.

² Mr. Thomas J. Kerwan, the attorney-investigator who made the original investigation of the individual respondents' advertisement (CX-1) prior to issuance of the complaint herein, was also called as a witness by counsel supporting the complaint. However, Mr. Kerwan was not called to testify in support of the allegations of the complaint. His testimony related to another matter which is separately discussed in this initial decision.

ents usually sold said merchandise at retail in the recent regular course of business. The individual respondents denied that the advertisement (CX-1) was false. Each of the alleged misrepresentations will be discussed.

9. The first item in the advertisement (CX-1) alleged to be false concerns the "Reg. 14.95 Fibre & Plastic Seat Covers" for sale at only \$2.94. (These are listed near the top of the advertisement (CX-1) under the heading "Tremendous Discounts".) In direct examination by counsel supporting the complaint, Mr. Levinson was asked if he could produce an invoice or sales slip in response to the subpoena duces tecum showing a previous retail sale at \$14.95 of the "Fibre" seat cover advertised under this heading in CX-1 and reduced to \$2.94 for the Washington's Birthday Sale. Mr. Levinson replied in the affirmative and produced and there was received in evidence CX-2, which was an invoice, dated June 25, 1958, representing the sale of a fibre seat cover at a retail price of \$15.00 which Mr. Levinson identified as a "Fibre" seat cover listed in the advertisement (CX-1) under the heading "Tremendous Discounts." Counsel supporting the complaint contends that this "Fibre" seat cover had not been regularly sold at \$14.95 as represented in the advertisement because the sale on June 25, 1958, was too remote and was not a sale in "the recent regular course of business", and, consequently, the "Fibre" seat cover had no usual and customary price and, therefore, the representation that \$14.95 was the regular price was false; and the represented savings amounting to the difference between \$14.95 and \$2.94 was not afforded to purchasers.

10. With respect to the "Plastic" seat covers listed in the same part of the advertisement (CX-1) under the heading "Tremendous Discounts", Mr. Levinson, in response to questions by counsel supporting the complaint, produced and there were received in evidence approximately 24 invoices, marked CX-3-13 and CX-265-278, which Mr. Levinson testified represented prior retail sales of these plastic seat covers. On none of these invoices is the retail price of the seat cover listed at less than \$15.00. The dates of these retail sales as shown by the invoices range between February, 1958 and October, 1959. It is the contention of counsel supporting the complaint that \$14.95 was not the regular price of these plastic seat covers because Mr. Levinson did not produce any sales slips or invoices showing a sale of one of these plastic seat covers at \$14.95 more recent than October, 1959. In other words, counsel contends that, since individual respondents did not produce an invoice showing a sale of this seat cover at \$14.95 more recent than four months immediately prior to the Washington Birth-

day Sale on February 22, 1960, the advertised regular price of \$14.95 was fictitious.

11. The evidence shows that, for many years, it has been the custom and practice of merchants in the Washington, D.C., area to advertise, along with other merchandise, soiled, shopworn and outdated merchandise for sale at reduced prices on Washington's Birthday, especially when the stock on hand of the particular merchandise is limited in amount. On some articles of merchandise, the price may be drastically reduced. As an example, a man's shirt which might ordinarily sell for \$5.00 but which was soiled, was shown to have been reduced to 99 cents for clearance at a Washington's Birthday sale. The evidence shows that the "Fibre & Plastic Seat Covers" advertised in CX-1 under the heading "Tremendous Discounts" were old and outdated and would fit 1935-1958 model automobiles, and were limited in amount as stock on hand. The advertisement specifically stated that the seat covers and floor mats advertised for sale at \$2.94 under the heading "Tremendous Discounts" would fit automobiles from models 1935-1958. The purpose of offering these articles of merchandise at the reduced price of \$2.94 was to clear the individual respondents' remaining stock of this old merchandise. Mr. Levinson produced numerous invoices to establish the representation in CX-1 that the seat covers advertised had been sold on numerous occasions during the years 1958 and 1959 at prices of \$14.95 and above. The circumstance that respondents did not produce sales slips showing sales of these very types of seat covers up to a few days immediately prior to the date of the Washington's Birthday sale on February 22, 1960 does not constitute a misrepresentation as to the so-called "regular" price of these seat covers. The advertisement (CX-1) referred to a Washington's Birthday sale and individual respondents wished to dispose of their limited stock in some of these particular items of merchandise. The general public in the Washington, D.C., area understands that merchandise advertised for sale at Washington's Birthday sales may be limited in amount or number, age, style, color, etc., and may be soiled, old, and outdated. Naturally, several months might intervene between retail sales of some of the merchandise. Under the circumstances and facts of record in this proceeding it cannot be held that respondents misrepresented the regular price of these seat covers by reason of the absence of invoices showing retail sales of the particular seat covers more recent than October, 1959. In the opinion of this hearing examiner, the interpretation of the meaning of the phrase "in the recent regular course of business" should depend upon the facts and circumstances of each particular case. The time element

alone (the period intervening between sales), as urged by counsel supporting the complaint, is not a fair and reasonable test in the case here under consideration. Counsel supporting the complaint did not show or even claim that individual respondents had ever sold said seat covers at a retail price *less* (underscoring mine) than \$14.95 prior to the date of the advertised Washington's Birthday sale of February 22, 1960. On the other hand, the invoices of record show retail sales at more than \$14.95 in every instance.

12. It is significant that the subpoenas duces tecum were not limited in scope to the three or four month period immediately preceding the Washington's Birthday sale on February 22, 1960. Instead, counsel supporting the complaint called upon Mr. Levinson to produce invoices showing retail sales of the seat covers and other merchandise advertised in CX-1 during the period February 23, 1958 to February 22, 1960. This is a period of approximately two years. Evidently, at the time of counsel's request for the issuance of the subpoenas, it was the theory of counsel supporting the complaint that a sale or sales of the specified seat covers at the advertised "regular" price during the two year period included within the subpoenas would satisfy counsel's interpretation of the phrase as having been sold in "the recent regular course of respondents business." Now, however, counsel seems to have changed his theory after examining the invoices produced by Mr. Levinson in obedience to the subpoenas duces tecum. This hearing examiner finds that \$14.95 was the "regular" price of the "Fibre & Plastic Seat Covers" advertised in CX-1 and they had been sold in the "recent regular course" of individual respondents' business at or above that price.

13. Counsel supporting the complaint also contends that the language "Reg. 5.95 Up Front or Rear Rubber Floor Mats" advertised in (CX-1) under the same heading "Tremendous Discounts," for sale at "2.94", was fictitious because Mr. Levinson did not produce invoices or sales slips showing a previous sale of rubber floor mats later than three months immediately preceding the date of the advertisement (CX-1), namely, February 22, 1960. Mr. Levinson produced almost 100 invoices showing sales of these rubber floor mats at prices ranging from \$5.95 and above, CX-14-16, CX-18-41, CX-279-290, and CX-292-348. The retail prices shown on these invoices range from \$6.95 to \$16.95. Counsel supporting the complaint did not offer even one sales slip showing a retail sale by individual respondents of one of these rubber floor mats at less than \$5.95. The latest and most recent invoice showing a retail sale of the advertised rubber floor mats prior to the Washington's Birthday sale on February 22,

1960, was November, 1959, approximately three months prior to the Washington's Birthday sale. Commission counsel contends that, for this reason, a regular price had not been established in the recent course of individual respondents' business and the claimed regular price of "5.95 Up" was false. Such an interpretation is arbitrary and unrealistic. The evidence shows that the floor mats, like the seat covers, were old and shop-worn, the supply was limited in amount, and individual respondents reduced the price to close out the stock. For these reasons and those set out in paragraphs 11 and 12 above, the circumstance that Mr. Levinson failed to produce an invoice showing a sale of one of these floor mats subsequent to November, 1959, does not make individual respondents' advertised price "Reg. 5.95 Up" any less the "regular" price for the floor mats.

14. The next misrepresentation claimed by counsel supporting the complaint relates to the "Clear Plastic" seat covers listed in the second section of the advertisement (CX-1) under the heading "Tremendous Selections." Under this heading respondents advertised "Reg. 14.95 to 24.95" Clear Plastic seat covers for sale at "Only 9.80." Previous retail sales of these Clear Plastic seat covers are shown in invoices CX-42-48 and CX-349-366. These invoices show previous retail sales of this particular type of Clear Plastic seat covers at prices ranging mostly from \$16.95 to \$29.95. The invoices show at least ten sales at \$24.95. Again, it is the contention of counsel supporting the complaint that, since these invoices do not show a retail sale of this particular type of seat cover within eight months immediately preceding the advertisement, (CX-1), there were "in fact no sales in the recent course of respondents' business upon which to base a regular price and, therefore, the claim of any regular price was unjustified. This hearing examiner does not agree with such a strained and unrealistic interpretation of "recent regular course of business." For the reasons stated in paragraphs 11 and 12 above, it is found that the advertised "Reg. 14.95 to 24.95" in CX-1 was the "regular" price for the Clear Plastic seat covers advertised for sale at "Only 9.80," under the heading "Tremendous Selections."

15. Counsel supporting the complaint makes a similar claim of fictitious pricing with respect to the "Woven Plastic" seat covers advertised under the same heading "Tremendous Selections." Sales invoices covering this type of seat cover are shown in CX-50-258 and CX-380-485. Counsel contends, *inter alia*, that, the statement "Reg. 14.95 to 24.95" in the same section of the advertisement under the heading "Tremendous Selections" can be reasonably interpreted as applying to each of the four kinds of seat covers listed therein, and that,

since the invoices showed only two sales of the "Woven Plastic" seat covers at \$24.95 on dates prior to the Washington's Birthday sale, and the last sale prior to the Washington's Birthday was for \$19.95, therefore, \$24.95 was not the individual respondents' regular price for this type of seat cover, but \$19.95 was the "regular" price. This is an unwarranted and unreasonable interpretation. For the reasons heretofore stated with respect to the other items, it is found that individual respondents' representation in CX-1 of a regular price of \$14.95 to \$24.95 for the "Woven Plastic" seat covers was not fictitious. Counsel also argues that, even admitting that the "reg." price is the usual and customary price of the items in the recent regular course of individual respondents' business, the amount of savings represented is false because "it compares a regular price which has been increased by the amount of the installation charge with the offering price which does not include that charge." The hearing examiner finds no merit in this contention. The advertisement (CX-1) plainly states that the "Regular" prices quoted in the advertisement (CX-1) includes a charge for installation, whereas the sale price does not.

16. The complaint also alleges that the designation of certain seat covers in the advertisement as "Plastic Fibre" and "Vinyl Fibre" were false and misleading for the reason that said seat covers are not made of plastic and vinyl fibers but are made of plastic and vinyl coated fibers. The only evidence in the record concerning the content of a "plastic" or "vinyl" fiber is the testimony of the individual respondent Levinson. Mr. Levinson testified that the "Plastic Fibre" seat cover listed in the advertisement (CX-1) is made of a fibrous material, with paper as its basic content, coated with a plastic, making it more resistant to wear. In reply to a question as to what kind of plastic the fiber was coated with, Mr. Levinson replied: "I am afraid that I would just be using general terms. They use the term 'vinyl resin'. However, vinyl and plastic in connection with coating are used interchangeably." Under the evidence of record, it cannot be found that these designations are false and misleading.

17. Counsel supporting the complaint contends that individual respondents' use of the term "Customized" in describing the "Clear Plastic" seat covers in the advertisement amounted to a representation that said seat covers were made-to-order for the automobile of each purchaser, whereas the seat covers were not made to order but were ready-made. The dictionary does not give a definition of the term "customized." The only evidence in the record as to the meaning of the term is the testimony of the individual respondent Charles M. Levinson. In answer to a question by counsel supporting the com-

plaint, Mr. Levinson testified that a "customized" seat cover is a common terminology in the seat cover business defining a set of seat covers that are made in advance to fit a specific model automobile. In connection with this charge, counsel supporting the complaint offered, and there was received in evidence, a size specification chart (CX-262) of the Howard Zink Corporation, manufacturer of the seat covers which individual respondents characterized in the advertisement as being "customized." This particular seat cover was designated in the Howard Zink catalog or size specification chart (CX-262) as "tailored". Mr. Levinson testified that he substituted the word "customized" to describe in the advertisement the same seat cover which the Howard Zink Corporation described as "tailored" in order to detract from the impact the use of such a description as "tailored" might have in the advertisement. The burden of proof is upon the Commission to establish the allegations set forth in the complaint by a preponderance of the evidence. Under the evidence of record, it cannot be found that, individual respondents' use of the word "customized" was false or misleading.

18. Counsel supporting the complaint also contends that individual respondents failed to adequately disclose in said advertisement that the installation charge is included in the stated regular price of the merchandise but is not included in the stated reduced or sale price of the merchandise, thus representing that the reduction in price and the consequent savings resulting to purchasers, is greater than is the fact. Counsel supporting the complaint contends that the statement at the bottom of the advertisement (CX-1): "Regular Prices Quoted Includes Installation, Installation Available At Nominal Charge" is not adequate notice of the "things therein stated" to persons reading the individual offering in the advertisement (CX-1). Counsel supporting the complaint says that "the tendency would be to compare the high 'regular' price and the lower offering price of each item, since there is no indication in respect to the individual item that the reader should do otherwise." The advertisement (CX-1) should be read in its entirety. In the opinion of this examiner the notice with respect to the installation charge is adequate. The advertisement plainly states that the regular prices include installation and the advertised sale prices do not include installation. The interpretation advanced by counsel supporting the complaint draws too fine a line of technical distinction. It is found, therefore, that this allegation had not been sustained.

19. As previously stated herein, the individual respondent Charles M. Levinson was called as the principal Commission witness by coun-

Initial Decision

60 F.T.C.

sel supporting the complaint. Counsel examined Mr. Levinson exhaustively with respect to approximately 475 invoices which had been progressively marked for identification at the request of counsel supporting the complaint. However, after examining Mr. Levinson concerning many of these invoices, counsel did not offer the invoices in evidence. It was only after repeated objections by counsel for individual respondents to Commission counsel's failure to offer the invoices in evidence that counsel finally offered the invoices and they were received in evidence. After lengthy questioning by Commission counsel of Mr. Levinson concerning the invoices, and noting that the retail price listed on each invoice was at least equal to or above the "reg." price of the particular item of merchandise advertised in CX-1, counsel supporting the complaint often announced that he did not intend to offer the particular invoice exhibit. After many objections by counsel for individual respondents to Commission counsel's failure to offer the invoices after having them marked for identification and examining Mr. Levinson concerning them, Commission counsel finally offered and there were received in evidence the approximately 475 invoices. During the presentation of testimony on behalf of the individual respondents, there were received in evidence an additional 1,728 invoices on behalf of individual respondents. Approximately 933 of these invoices related to the "Jet spun Gardlon" and 795 to the "Woven Plastic" seat covers advertised in CX-1 as "Reg. 14.95 to 24.95" on sale for "9.80" under the heading "Tremendous Selections." In none of these invoice exhibits was the retail price of the seat cover listed at less than the minimum 14.95 advertised in CX-1. It might be stated, in this connection, that counsel supporting the complaint did not offer any testimony to refute the advertised "Reg. 14.95 to 24.95" price with respect to the Jet spun Gardlon seat covers. The 795 invoices relating to the "Woven Plastic" seat covers received in evidence on behalf of individual respondents were in addition to the approximately 313 invoices marked CX-50-258 and CX-380-485.

20. During the course of the hearing, counsel for individual respondents objected to certain testimony in support of the complaint. The grounds for the objections were that individual respondents had not been advised with respect to the purpose and scope of the Commission's investigation of individual respondents' advertising of the Washington's Birthday sale prior to requiring individual respondents to furnish information as required by Section 1.33 of the Commission's procedures. To rebut this contention, counsel supporting the complaint called Mr. Thomas J. Kerwan, an attorney with the Federal Trade Commission Washington Field Office, who made the inves-

930

Decision

tigation of the Washington's Birthday sale advertisement (CX-1) prior to issuance of the complaint herein, as a witness for the Commission. Mr. Kerwan testified, among other things, that, he visited individual respondents' place of business the first time on or about June 2, 1960 and advised Mr. Levinson that he (Mr. Kerwan) had been instructed to investigate the individual respondents' advertising, specifically, the Washington's birthday sale of 1960 and any other advertising that had not been submitted to the Commission. Individual respondents had previously entered into a stipulation with the Federal Trade Commission dated December 20, 1957, with respect to certain past advertising practices and, pursuant to the stipulation agreement, individual respondents, on or about January 23, 1960, submitted a draft or proof of an advertisement which they proposed to publish in the Washington, D.C., newspapers advertising the Washington's Birthday sale to be held on February 22, 1960. Representatives of the Commission examined the draft of the proposed advertisement and replied in writing with certain comments and suggestions with respect thereto. Individual respondents made certain changes in the proposed advertisement and, with such suggested changes, the advertisement (CX-1) appeared in *The Evening Star* on February 21, 1960 and *Washington Post* on February 22, 1960. Under date of February 23, 1960, individual respondents forwarded to the Commission a copy of the advertisement (CX-1) as it had appeared. The hearing examiner overruled the objections made by counsel for individual respondents and held that, in his opinion, Mr. Kerwan, the Commission attorney who originally investigated individual respondents' advertising, complied with Section 1.33 of the Commission's procedures.

CONCLUSION

It having been found that the allegations of the complaint have not been established by a preponderance of the evidence, it is concluded that the complaint should be dismissed.

ORDER

It is ordered, That the complaint be, and the same hereby is, dismissed.

DECISION OF THE COMMISSION

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective July 21, 1961, the initial decision of the hearing examiner shall, on the 28th day of April 1962, become the decision of the Commission.

Complaint

60 F.T.C.

IN THE MATTER OF

FOREMOST DAIRIES, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

*Docket 6495. Complaint, Jan. 17, 1956—Decision, Apr. 30, 1962**

Order requiring the fourth largest dairy firm in the country to sell ten industry concerns it acquired in 1952, 1953, and 1955, which acquisitions might substantially lessen competition or tend to create a monopoly, in violation of Sec. 7 of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45) and Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent, Foremost Dairies, Inc., hereinafter referred to as "Foremost", now and at all times relevant herein, is a corporation organized and existing under the laws of the State of New York with its main and principal office located at 2903 College Street, Jacksonville, Fla.

PAR. 2. Foremost is now and at all times relevant herein has been engaged in the purchase, processing and distribution of a diversified line of dairy products. Where used herein the term "dairy products" shall include one or any number of the following products: milk, cream, ice cream, cheese, butter, eggs, canned fresh milk, and evaporated milk. Foremost distributes the various dairy products to retail consumers and to stores, restaurants, hotels and other miscellaneous outlets. Prior to and at the time of the acquisitions herein, Foremost purchased, processed and distributed dairy products in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, and still does.

PAR. 3. Foremost was initially organized in October 1931 under the laws of the State of Delaware and in 1949 Foremost was merged with

*As modified May 15, 1962.